No. 239

Office - Supreme Court, U.S.
FILED
JUN 31 ...
JOHN T. FEY, Clerk

BRIEF AND APPENDIX FOR APPELLANT

United States Court of Appeals

FOR THE FOURTH JUDICIAL CIRCUIT

No. 7366

APRIL TERM, 1957

JOSEPH N. ROMM, *Appellant,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Appellee.*

Appeal from Decision and Order of the Tax Court of the United States

---

WARREN W. GRIMES,
Shoreham Building,
15th & H Sts., N. W.,
Washington 5, D. C.,
Counsel for Appellant.

10. (2) (a) INDEX AND CITATIONS

	Page
Title Page	i
Index and Citations	ii
Statement of the case and Questions involved	1
Jurisdictional statement	2
Statutes involved	2
Statement of facts	3
Summary of the argument	5
Argument:	
I. No new issues were raised or involved	5
II. Entirely new decision being compelled, Court below had both power and duty to make it correctly	6
III. The figures found in the decision are incorrect under the law and from the record	7

CITATIONS

Commissioner v. Wells, 132 F.2 405	7
Drybrough v. Comm, 238 F.2 735	8
Gunn, C. C. v. Comm. 247 F.2 359	5
Gunn, C. C. v. Comm. 157 F. Supp. 169	5
Pacific Affiliates Inc. v. Comm. 18 TC 1175. Affirmed in 224 F.2 578	8
Polizzi, Charles A., v. Comm 247 F.2 875	6
Stark, Sidney et al v. Comm 29 TC—No. 17	8
Stein, Esther M, v. Comm 25 TC 904	7
Stern Bros & Co. v. Comm. 16 TC 295	7
Black's Law Dictionary, 3rd Ed. "Issue"	6

United States Court of Appeals

FOR THE FOURTH JUDICIAL CIRCUIT

No. 7366

APRIL TERM, 1957

JOSEPH N. ROMM, *Appellant*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Appellee*.

Appeal from Decision and Order of the Tax Court of the United States

---

BRIEF AND APPENDIX FOR APPELLANT

STATEMENT OF THE CASE

Appeal from Tax Court decision holding appellant liable for total of $40,517.95 income tax deficiences and $31,339.33 fraud penalties for the years 1942 through 1946.

QUESTIONS PRESENTED

I. Did the Tax Court err in holding that a new issue was raised by petitioner's motion and counter-recomputation under Rule 50, following mandate?

II. Did the Tax Court fail in its duty and the exercise of its power to consider petitioner's law contentions as to entry of a new decision following hearing granted?

III. Did the Tax Court err in failing and refusing to find the correct tax liabilities of petitioner in the Rule 50 proceeding?

Appellant's contention is that all of these questions should be answered affirmatively.

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal under 26 U.S.C., section 7482 (a) and (b), *infra*. The tax returns were filed with the Baltimore, Md. Internal Revenue Office. The decision appealed from was entered December 17, 1957,—following this Honorable Court's modification, affirmance and mandate issued June 29, 1957 under present docket number. Petition for this review was filed January 15, 1958.

STATUES INVOLVED

Title 26 U.S.C., Sec. 7482 Courts of Review.

> (a) "Jurisdiction—The United States Courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court.
>
> (b) Venue— * * * such decisions may be reviewed by the United States Court of Appeals for the circuit in which is located the office to which was made the return of the tax in respect of which the liability arises."

Title 26 U.S.C., Sec. 7481. (3) (b) (4):

> "Rehearing. * * * if the case is remanded by the United States Court of Appeals to the Tax Court for a rehearing, * * * then the decision of the Tax Court rendered upon such rehearing shall become final in the same manner as though no prior decision of the Tax Court has been rendered."

Rule 50, Tax Court of the United States. * * *

> "b) Procedure in absence of agreement—If, however, the parties are not in agreement as to the amount

of the deficiency or overpayment to be entered as the decision, in accordance with the report of the Court, either of them may file with the Court a computation of the deficiency or overpayment believed by him to be in accordance with the report of the court. The clerk will serve a copy thereof upon the opposite party, will place the matter upon a motion calendar for argument in due course and will serve notice of the argument upon both parties. If in accordance with this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, and the court will determine the correct deficiency or overpayment and enter its decision.

(c) Limits on argument under this Rule—Any argument under this Rule shall be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues on matters already disposed of by such report or any new issues.

* * *"

(10) (2) STATEMENT OF THE FACTS

1. Petitioner Joseph N. Romm is a resident of Takoma Park, Maryland. His income tax returns were filed with the Collector (now District Director) of Internal Revenue at Baltimore, Maryland.

2. On October 25, 1954, respondent mailed to petitioner a notice of deficiency in income taxes and additions as follows:

1942	2,159.56 deficiency	$ 1,079.78 Addition
1943	2,211.52 deficiency	1,105.76 Addition
1944	16,321.23 deficiency	8,160.61 Addition
1945	17,038.79 deficiency	8,519.39 Addition
1946	9,582.59 deficiency	42,187.80 Addition

3. Petitioner duly petitioned the Tax Court of the United States, the case was tried on joint stipulation,

oral and written evidence, and on April 30, 1956, memorandum findings of facts and opinion by Hon. John E. Mulroney, Judge of said Tax Court, were entered. A printed copy thereof is in the files of this Honorable Court, docket No. 7366,—appellant's appendix, P. 23.

4. On July 24, 1956, respondent filed his computation for entry of decision under Rule 50 of said Tax Court. Petitioner's counsel agreed that the computation was in accordance with the Tax Court's then opinion. Based thereon, the Tax Court decision was entered on July 26, 1956 for the following; *Ibid*, p. 36:

1942	$ 2,159.56	Deficiency	$ 1,079.78 Addition
1943	2,145.22	Deficiency	1,072.61 Addition
1944	15,745.65	Deficiency	7,872.83 Addition
1945	16,853.67	Deficiency	8,426.84 Addition
1946	4,445.69	Deficiency	12,065.43 Addition

5. Petitioner duly filed petition for review by this Honorable Court (docket 7366) which on May 27, 1957, affirmed in part and modified in part and on June 29, 1957, issued its judgment and mandate (ap. 1) remanding the case to the Tax Court for further proceedings not inconsistent with the opinion.

6. On October 31, 1957, and in lieu of a computation, respondent filed with the Tax Court his motion for entry of decision as to tax deficiencies and additions as revised. App. 1. Petitioner was neither served, nor notified by the clerk, nor given any opportunity to be heard as provided in Rule 50 of the Tax Court. Nevertheless and on November 4, 1957, the Tax Court proceeded to enter its decision only as asked by the respondent. App. 2.

7. Whereupon, petitioner filed his motion to stay, for hearing, reconsideration and leave to file his own counter-computation under Rule 50—copy appearing at App. 3. On November 20, 1957, the Tax Court entered order (app. 11) vacating and setting aside its decision entered No-

vember 4, 1957, and set December 11, 1957, for hearing on the motions filed by both parties,—which was held in Judge Mulroney's chambers, without reporter, although petitioner's counsel filed a memo giving citations and basis for his claim.

8. December 17, 1957, Judge Mulroney's order and decision were entered, denying petitioners motion and granting respondent's motion. App. 12. Petition for review by this Court was filed and served November 21, 1957. App. 13.

(c) (8) SUMMARY OF THE ARGUMENT

9. I. No new issues were raised or involved.

II. An entirely new decision being compelled by the mandate, the Tax Court had both the power and duty to make it correctly.

III. The figures found in the decision are incorrect under the law from the record in the case.

I. No new issues were raised by petitioner or involved.

10. The Court below takes the position petitioner was asking a new rule 50 computation based upon an argument which raised new issues. First: a new computation was required by the mandate of this Court and under the law which "stripped" the first decision of its finality as though it had not been rendered. See 26 USC, sec. 7481 (B)-(4); *C. C. Gann* v. *Commissioner*, 157 F. Supp. 169, 177—quoting from *C. C. Gann* v. *Comm.* 247 F.2 359 and heavily relied upon here (*infra*).

11. Throughout it was impressed upon the Court below that no question was raised as to any of the issues decided, that no new evidence was in order and that all petitioner was doing was following that Court's own Rule 50 and asking for that "correct" computation specifically

required. All of the supporting facts were already in the record.

12. It is Hornbook law that an issue is a single, certain and material point raised by the pleadings, affirmed on one side and denied upon the other *Black's Law Dictionary*, 3rd Ed., "Issue".

13. But even if it is held a new issue was raised, the Tax Court still is in error under the circumstances here, as shown by *Chas. A. Polizzi* v. *Comm.*, (CA-6) 247 F.2 875 remanding to the Tax Court for even allowing new evidence (which we do not ask), the Sixth Circuit holding that running through all of the decisions it is clear the taxpayer should not suffer through "a wrongful determination of his tax liability." (877, 878).

14. So also the decision below errs in relying upon the statement that the parties filed an agreed computation of the tax on July 24, 1956, after the opinion below. All the parties then did or do under such circumstances is to agree that certain figures are correct "under the court's opinion." But we never agreed with the Tax Court's opinion and neither did this Honorable Court as to portions thereof.

II. An entirely new decision being compelled, the Tax Court had both the power and the duty to make it correct.

15. The Tax Court's position is that it was restricted by the mandate to one item for one year and to eliminating the wife as a party. But there is nothing in the wording of the mandate which required the Tax Court to close its eyes to gross error.

The mandate was for further proceedings not inconsistent with Your Honor's opinion, which referred to issues. There is nothing whatever in the petitioner's position inconsistent with anything in your opinion.

16. There is nothing new in petitioner's position. The Tax Court's own Rule 50 thrice states that the computation of the deficiency must be correct. In the *Polizzi* decision, *Supra*, the Court of Appeals even ordered the Tax Court to consider an issue not raised earlier because, citing *Commissioner v. Wells*, 132 F.2 405, 408, and others, it said rules of practice and procedure were devised to promote the ends of justice. It held the taxpayer's motion on recomputation there could have been considered one to amend the pleadings and could and should have been granted.

17. Our motion was one for hearing and reconsideration of the figures, accompanied by a recomputation based entirely upon the record. Even had it been framed technically as a motion to amend, not a solitary item of new evidence would have been involved—although in Polizzi such was indispensable.

III. The figures found by the Tax Court are grossly incorrect in law.

18. Following the Tax Court's opinion April 30, 1956, respondent himself prepared a computation under Rule 50 which, as the Tax Court now says, the parties agreed on July 24, 1956, was in accordance with the Tax Court's then opinion. At the time this computation was made and filed, the respondent had consistently refused to acquiesce in the decisions in *Stern Bros. & Co.* v. *Comm.*, 16 TC 295, and *Esther M. Stein v. Comm.*, 25 TC 904,—his refusal being covered by Revenue ruling 107 (CB 1953-1, 178),—so that his Rule 50 computation followed that ruling.

19. After the present case had been appealed to this Court and while the Stern and Stein cases also were on appeal, respondent reversed his position, revoked his ruling 107 and issued a new ruling (57-332, IRB (1957

29-8) finally acquiescing in the Stern and Stein decisions. These two decisions are the key to the petitioner's case.

20. Under them, where in a net worth increase case, as here; and where a fraudulent return was filed, the amounts later asserted as penalties and deficiencies must be treated as legitimate debts of the taxpayer due on the return date and, if then unpaid, must be treated as deductions in computing net worth for the return year.

21. On December, 1956, the 6th Circuit decided *Drybrough et al* v. *Comm.*, 238 F.2 735, which cited *Stern* and *Stein* with approval and held first that accrual or cash bases were not involved—also that disputed taxes as well as penalties must be deducted to arrive at the "true financial status" which is the sole objective of the net worth method. We contend that "true financial status" as so used means no more than "net worth".

22. *Pacific Affiliates, Inc.* v. *Comm.*, 18 TC 1175 affirmed in 224 F.2 578, holds pointedly the fact the assertions were not made until later years does not affect proper deduction in the year succeeding that to which the assertion applied.

23. Then came *C. C. Gunn* v. *Comm.*, 247 F.2 359,—an individual net worth case, in which the 8th Circuit said the approach to the establishment of net worth must be "a question of getting at business or economic reality, regardless of the fact that the taxpayer may be a revenue delinquent"; also "is a matter of getting at actual economic fact and of not allowing reality to be obscured by engaging solely in a rigid tax-incident glance"—that the question of its fairness or correctness should not too loosely be allowed to be "brushed under the rug of Commissioner presumption". This Gunn case later went into the District Court and an injunction granted, as shown *supra*. *Stern* and *Stein* again appear in the very recent Sidney Stark et al v. Comm., 29 TC—No. 17.

24. In the present case, the Tax Court had made its findings of fact as to net worth figures. Petitioner agreed (and the record so shows) the *use* of the *method* was justified, that such figures as were included were correct but disagreed with the inclusion of some, with the failure to include others and specifically against the resultant figures as to the purely theoretical income,—and this Honorable Court's modifications confirm we were justified. We did sign that the first figures below were "in accordance with the Tax Court's opinion" but we did not agree with the opinion and neither did this court in full. But the main point is that the pleadings, opening with the deficiency notice, gave the assertions for each year and respondent's answer admitted them. If our point was a new issue, all we could do would be to show without further evidence the same figures,—so we have contended no new issue was raised.

25. When the Tax Court issued its decision under the mandate, later revoking it and permitting petitioner to file his counter-computation as authorized specifically by Rule 50,—that counter-computation claimed these assertions as reductions of net worth under the *Stern*, *Stein*, *Drybrough* and other cases cited.

26. The Tax Court's attention pointedly was called to *Chas. A. Polizzi* v. *Comm.*, supra, where the 6th circuit dealt directly with the duties imposed by Rule 50. In that case, as here, the issues raised had been decided. On the Rule 50 hearing the taxpayer contended the computation should have been made on a joint return basis. This had not been one of the issues, but the 6th Circuit held the Tax Court should have followed the taxpayer, even though his motion may have been untimely and should have been to amend the pleadings. It directed the taxpayer's contention should have been granted because there had been "a wrongful determination of the tax liability". This precisely is petitioner's contention here.

27. The Tax Court in effect followed this on one issue here, by refusing to permit an allowed net operating loss carry-back from 1948 to 1946 to reduce the deficiency for 1946 but not the penalty—on the same theory of our decisions that the tax and penalties were due and payable when the fraudulent return was filed—even though a later carry-back would change the tax liability figure. The same denial was made to disallow the substantial voluntary payment made by petitioner prior to the deficiency notice because (and this Court so confirmed) the penalty for 1946 here was due on March 15, 1947. That is why both this Court and the Tax Court found a 50% penalty for 1946 around 150% of the 1946 deficiency.

28. Petitioner's computation applies the same *Stern, Stein, Drybrough*, etc., principle not only to the tax and penalty liabilities (as reductions for each year), but by the same reasoning also the statutory interest due and unpaid at the end of each year in which the said tax and penalty liabilities accrued and were unpaid. Net worth computations are made as of the close of each year.

29. The Commissioner of Internal Revenue has formally admitted that petitioner's contentions here are correct. He did so when he reversed his former non-acquiescence and accepted the principle of the Stern and Stein decisions. Petitioner here merely is asking that he be granted what the Commissioner (amplified by the other decisions cited) show without exception he is entitled.

30. Applying the principles as contended for by petitioner, the final figures as to liability as found by the Tax Court are grossly incorrect, contrary to Rule 50 and the decisions and manifestly unfair, as shown below:

	Tax Court		*Petitioner's Computation*	
1942	$ 2,159.56	$ 1,079.78	2,159.56	$ 1,079.78
1943	2,145.22	1,072.61	707.95	353.98
1944	15,745.65	7,872.83	11,536.89	5,768.45
1945	16,853.67	8,426.84	1,500.43	750.22
1946	3,613.85	12,887.27	(13,088.81)*	4,016.06
	40,517.95	31,339.33	1,816.02	11,968.49
		40,517.95		1,816.02
Totals without Interest		$71,857.28		$13,784.51

*Overpayment from August 11, 1954.

CONCLUSION

31. Petitioner accordingly asks that this Honorable Court reverse the decision of the Tax Court entered December 17, 1957, insofar as it relates to the final computation of the liability figures; and remand the case with instructions to correctly redetermine the figure liability, reducing the theoretical taxable income based upon the net worth computation, found by it, by reducing the increase in said net worth as of the end of each calendar year by the amounts of deficiencies and penalties asserted as due and unpaid upon the date each return was filed, as shown by the deficiency notice in the pleadings, as well as any statutory interest due and unpaid thereon as of the close of each year.

Respectfully submitted:

WARREN W. GRIMES,
Shoreham Building,
Washington 5, D. C.,
Attorney for Appellant.

APPENDIX INDEX

Contents

	App. Page
Judgment and mandate of this Court	1
Respondent's motion for entry of Tax Court decision	1
Tax Court decision thereon, entered November 4, 1957	2
Appellant's motion to stay, for hearing, reconsideration and leave to file under Rule 50 T.C.	3
Appellant's motion for decision	4
Appellant's recomputation under Rule 50	5
Tax Court order vacating its November 4, 1957, decision and setting for arguments	11
Order and decision of Tax Court appealed herein	12
Petition for review	13

JUDGMENT AND MANDATE

On Petition to Review the Decision of The Tax Court of the United States.

This Cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is hereby, modified as set forth in the opinion of the Court filed herein and, as so modified, it is affirmed; and that this cause be, and the same is hereby, remanded to The Tax Court of the United States for further proceedings not inconsistent with the opinion of the Court filed herein. May 27, 1957.

SIMON E. SOBELOFF
United States Circuit Judge.

June 29, 1957, mandate issued and transmitted to the Clerk of The Tax Court of the United States at Washington, D. C.

RESPONDENT'S MOTION FOR ENTRY OF DECISION

Comes Now the Commissioner of Internal Revenue by his attorney, Nelson P. Rose, Chief Counsel, Internal Revenue Service, and pursuant to the opinion and mandate issued in this case by the United States Court of Appeals for the Fourth Circuit shows the Court that the deficiencies and penalties found in its decision entered July 26, 1956, have been assessed under Section 7485, Internal Revenue Code of 1954, and have not been paid.

As indicated in the deficiency notice issued in this case on October 25, 1954, a copy of which is appended

to the Petition as Exhibit A, the Commissioner allocated $821.84, part of the payment made on August 11, 1954 (Stip. of Facts Par. 2, filed December 12, 1955) to the fraud penalty for 1946. He also applied $10.00 of said payment made prior to the issuance of the deficiency notice to accrued interest for 1946. As directed by the mandate the Court should find that there are now unpaid deficiencies in income tax and fraud penalties as follows:

Year	*Income Tax*	*Additions to Tax*
1942	$ 2,159.56	$ 1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,887.27

/s/ NELSON P. ROSE
NELSON P. ROSE
Chief Counsel
Internal Revenue Service

DECISION OF TAX COURT

(Entered November 4, 1957)

Pursuant to the Mandate of the United States Court of Appeals for the Fourth Circuit, filed July 1, 1957, whereby the decision of this Court in this cause was modified and the motions for entry of decision filed by the respondent herein on October 31, 1957, it is

ORDERED: That the above entitled case, in so far as it purports to relate to Helen K. Romm, be dismissed as to her, and it is

ORDERED and DECIDED: That there are no deficiencies in income tax and additions to tax, or overpayments therefor, due from or to her for the taxable years 1942 to 1946, inclusive; and it is further

ORDERED and DECIDED: That there are now unpaid deficiencies in income tax and additions to the tax due from petitioner Joseph N. Romm, as follows:

Year	*Income Tax*	*Additions to Tax*
1942	$ 2,159.56	$ 1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,887.27

JOHN E. MULRONEY,
Judge.

APPELLANT'S MOTION FOR STAY, HEARING, RECONSIDERATION AND LEAVE TO FILE UNDER RULE 50

Comes now Joseph N. Room, petitioner, by his attorney of record and respectfully moves for a stay of the judgment and decision of this Honorable Court entered November 4, 1957; for hearing and reconsideration thereof; and for leave to file counter-recomputation in disagreement thereto, under Rule 50 (b).

The reasons for this motion are that on October 29, 1957, the day the Supreme Court denied certiorari in this case, petitioner's counsel conferred with counsel for respondent and then was handed a rough draft of respondents proposed recomputation figures as to result only, but no recomputation upon which the same were based. Petitioner then stated he would disagree therewith, file his own recomputation and motion and discussed the legal reasons for such action. It then was orally agreed that such cross-computation would be prepared in detail and submitted to respondent with a letter brief in support thereof, both to be checked by respondent. Petitioner was occupied for several days upon the detailed recomputation and did submit the same to the respondent with the

bases for showing that his proposed final figures were not "correct" as required by Rule 50. Nevertheless and without serving upon petitioner either a copy of his proposed motion for entry of judgment, motion for entry of decision, proposed decision or any recomputation underlying them, respondent filed the same on October 31, 1957. The motions and proposed decision never were set down for hearing or opposition and petitioner never given a reasonable opportunity to pursue the procedure prescribed in paragraph (b) of Rule 50—to petitioners substantial prejudice. Wherefore, petitioner asks that this motion be granted and the matter be set down for argument in accordance with Rule 50 (b).

/s/ WARREN W. GRIMES
Attorney for petitioner.

APPELLANT'S MOTION FOR ENTRY OF DECISION

Comes now the petitioner, Joseph N. Romm, by his attorney, Warren W. Grimes, and pursuant to the opinion and mandate issued in this case by the United States Court of Appeals for the Fourth Circuit, respectfully shows this Court that, under Rule 50 computation attached hereto, its decision should be entered for the following correct amounts:

Year	Income Tax Deficiencies	Additions to the Tax
1942	$ 2,159.56	$1,079.78
1943	707.95	353.98
1944	11,536.89	5,768.45
1945	1,500.43	750.22
1946	(13,088.81) Overpayment August 11, 1954	4,016.06

and that the amounts found by this Court in its decision entered July 26, 1956, having been assessed under Sec-

tion 7485, I.R.C. for 1954, not having been paid, the assessment to be revised to conform hereto.

WARREN W. GRIMES
Attorney for Petitioner

APPELLANT'S RULE 50 COMPUTATION

Taxable Year Ended December 31, 1942

SCHEDULE 1

There would be no change in the $2,159.56 deficiency and $1,079.78 penalty as finally found by the Tax Court.

Taxable Year Ended December 31, 1943

SCHEDULE 2

ADJUSTMENT OF NET INCOME

	Income Tax Net Income	*Victory Tax Net Income*
Net income per notice of deficiency October 25, 1954	$12,376.24	$13,419.72
Less: Reduction in income (2-A below)	3,500.38	3,500.38
Net income adjusted	$ 8,875.86	$ 9,919.34

SCHEDULE 2-A

EXPLANATION OF ADJUSTMENTS

(a) Amount of petitioner's daughter's savings account No. R-714, allowed by Tax Court	$ 161.70
(b) Deficiency asserted for 1942, due 3/15/43 and unpaid	2,159.56
(c) 50% penalty asserted for 1942, due 3/15/43 and unpaid	1,079.78
(d) Statutory interest on $2,159.56 deficiency, 3/15/43 to 12/31/43, close of net worth year, computed at 4.6%	99.34
Total reduction in income	$ 3,500.38

Taxable Year Ended December 31, 1943

SCHEDULE 3

COMPUTATION OF INCOME AND VICTORY TAX

Adjusted income tax income, Sch. 2		$ 8,875.86
Less: personal exemption		1,200.00
Surtax net income		7,675.86
Less earned income credit		300.00
Normal tax net income		7,375.86
Normal tax at 6%		442.55
Surtax ($980.00 on $6,000 plus 13% of $1,675.86)		1,197.86
Total income tax liability		$ 1,640.41
Adjusted Victory tax net income, Sch. 2	$9,919.34	
Less specific exemption	624.00	
Income subject to Victory tax	9,295.34	
Victory tax before credit (5% of $9,295.34)	464.77	
Less Victory tax credit (40% of $464.77)	175.91	
Net Victory tax		288.86
Total income and Victory tax liability		1,929.27
Income tax and Victory tax liability shown on return (line 16) Account 368405		1,221.32
Deficiency in income tax		707.95
50% penalty		353.98

SCHEDULE 3-A

	Shown by return	As corrected
(1) (a) Income and victory tax, line 16, p. 4 of return	$1,221.32	$1,929.27
(b) Unforgiven part of 1942 tax, line 19(c), p. 4 of return	243.20	243.20
(c) Total income and victory tax	1,464.52	2,142.47

Taxable Year Ended December 31, 1943

(2) Less:				
(a) Income and victory tax withheld	None			
(b) Income tax paid on 1942 income	$486.42			
(c) Tax paid on 1943 income on account of declaration of estimated tax	486.42		$486.42	
(d) Tax assessed on 1943 return	491.68	$1464.52	491.68	$978.10
(3) Additional amount to be assessed				

Taxable Year Ended December 31, 1944

SCHEDULE 4

ADJUSTMENTS TO NET INCOME

Net income shown in deficiency notice, October 25, 1954	$ 36,181.71
Less: Reduction in income (4-A below)	4,293.19
Net income as adjusted	$ 31,888.52

Taxable Year Ended December 31, 1944

SCHEDULE 4-A

EXPLANATION OF ADJUSTMENTS

Net income as shown in net worth statement as of 12/31/44 is decreased by the following:

(1) Savings of petitioner's daughter, account No. R-714		
Balance 12/31/44	$508.05	
Balance 12/31/43	161.70	$ 346.35
(2) Proceeds of endowment policy (½ of $1,000.20) deposited in wife's savings account		500.10
(3) Deficiency asserted for 1943 due 3/15/44 and unpaid		2,145.22
(4) 50% penalty for 1943, due 3/15/44 and unpaid		1,072.61
(5) Statutory interest @ 6% p.a. on 1943 deficiency, 3/15/44 to 12/31/44, computed @ 4.6%		99.34
(6) Statutory interest on 1942 deficiency of $2,159.56, unpaid on 12/31/44		129.57
Total decrease of net income shown in statement of net worth as of 12/31/44		$4,293.19

Taxable Year Ended December 31, 1944

SCHEDULE 5

COMPUTATION OF INCOME TAX

Adjusted net income		$ 31,888.52
Less: Surtax exemption		1,000.00
Surtax net income		$ 30,888.52
Surtax ($10,740 plus 62% of $4,888.52)		13,770.88
Adjusted net income	$ 31,888.52	
Less normal tax exemption	500.00	
Normal tax net income	$ 31,388.52	
Normal tax, 3% on $31,388.52		956.66
Total income tax liability		$ 12,814.22
Income tax liability per return (Acct. 3017307)		1,277.33
Deficiency in income tax		11,536.89
50% Penalty		5,768.45

Taxable Year Ended December 31, 1945

SCHEDULE 6

ADJUSTMENT OF NET INCOME

Net income shown in deficiency notice, October 25, 1954	$ 37,899.27
Less: Reduction in income, 6-A below	24,961.51
Net income as adjusted	$ 12,937.76

Taxable Year Ended December 31, 1945

SCHEDULE 6-A

EXPLANATION OF ADJUSTMENTS

Net income as shown in the net worth statement as of 12/31/44 is decreased by the following:

(1) Savings of petitioner's daughter, Account No. R-714		
Balance 12/31/45	868.50	
Balance 12/31/44	508.05	$ 360.45
(2) Deficiency asserted for 1944, due 3/15/45 and unpaid		15,745.65
(3) 50% penalty for 1944, due 3/15/45 and unpaid		7,872.83
(4) Statutory interest on 1944 deficiency, 3/15/45 to 12/31/45, computed at 4.6%		724.30
(5) Statutory 6% interest on 1942 deficiency of $2,159.56, unpaid on 12/31/45		129.57
(6) Statutory 6% interest on 1943 deficiency of $, unpaid on 12/31/45		128.71
Total decrease of net income shown in statement of net worth as of 12/31/45		$ 24,961.51

COMPUTATION OF INCOME TAX

Adjusted net income, Sch. 6		$ 12,937.76
Less: surtax exemption		1,000.00
Surtax net income		$ 11,937.76
Surtax ($2,640 plus 38% of $1,937.76)		2,795.02
Adjusted net income	$12,937.76	
Less: normal tax exemption	500.00	
Normal tax net income	$12,437.76	
Normal tax thereon @ 3%		373.13
Total income tax liability		$ 3,168.15
Income tax liability per return. Acct. 9080990		1,667.72
Deficiency in income tax		$ 1,500.43
50% penalty		$ 750.22

Taxable Year Ended December 31, 1946

SCHEDULE 8

ADJUSTMENTS TO NET INCOME

Net income per deficiency notice, October 25, 1954		$55,610.62
Less: (a) Reduction in income, 8-A below	$27,602.29	
(b) Net 1948 operating loss carry-back	6,774.34	34,576.63
Net income as adjusted		$21,033.99

SCHEDULE 8-A

EXPLANATION OF ADJUSTMENTS

(a) (1)	Savings account of petitioner's daughter (No. R-714):		
	Balance 12/31/46	$1,211.99	
	Balance 12/31/45	868.50	$ 343.49
(2)	Deficiency asserted for 1945, due 3/15/46 and unpaid		16,853.67
(3)	50% penalty thereon		8,426.84
(4)	Statutory interest on 1945 deficiency, 3/15/46 to 12/31/46 year's net worth date, computed at 4.6%		775.27
(5)	Statutory interest on 1942 asserted deficiency of $2,159.56, unpaid on 12/31/46		129.57
(6)	Statutory interest on 1943 asserted deficiency of $2,145.22		128.71
(7)	Statutory interest on 1944 asserted deficiency of $15,745.65		944.74
	Total reduction in income—exclusive of Carry-back		$27,602.29

Taxable Year Ended December 31, 1946

(b) Net operating loss carry-back from 1948, allowed by Tax Court, computed as follows:

Net loss per 1948 return		($13,396.22)
Capital items charged to expense	$6,201.34	
Excessive depreciation	81.36	
Bldg. Assn. dividends	139.18	6,421.88
Corrected net operating loss		$ 6,974.34

SCHEDULE 9

COMPUTATION OF INCOME TAX

Adjusted net income, schedule 8		$21,033.99
Less: exemptions		1,000.00
Income subject to tentative normal tax and surtax		20,033.99
Combined tentative normal tax and surtax, ($7,270.00 plus 53% of $33.99)		7,288.01
Less: tax reduction (5% of $7,288.01)		364.40
Total income tax liability		$ 6,923.61
Income tax liability per return— Acct. 3030452	$ 2,744.79	
Additional, Acct. 39-605120— 1954 List (8/11/54)	16,436.79	
Additional, Acct. 39-605120— 1954 List (8/11/54) Amount erroneously credited to 1946 penalty and ruled by CCA to be applied to deficiency	831.84	
Total tax paid		$20,012.42
Overpayment		$13,088.81

Taxable Year Ended December 31, 1946

SCHEDULE 10

COMPUTATION OF TAX BEFORE ALLOWANCE OF 1948 NET OPERATING LOSS CARRY-BACK FOR DETERMINATION OF FRAUD PENALTY.

Net income per deficiency notice, October 25, 1954	$55,610.62
Less: reduction in income, Sch. 8-A	27,602.29
Net income adjusted, before allowance of 1948 net operating loss carry-back	$28,008.33
Less: exemptions	1,000.00
Income subject to tentative normal tax and surtax	$27,008.33
Combined tentative normal tax and surtax ($10,770.25 plus 59% of $1,008.33)	11,365.16
Less: Tax reduction (5% of $11,365.16)	568.26
Total income tax liability before allowance of net operating loss carry-back	$10,796.90
Income tax liability shown on return—Acct. 3030452	2,744.79
Deficiency for purposes of penalty computation	$ 8,052.11
50% penalty	$ 4,016.06

ORDER VACATING TAX COURT DECISION AND SETTING HEARING

Upon consideration of motion of counsel for petitioners filed this date, the decision of this Court entered November 4, 1957, is hereby vacated and set aside, and it is further

ORDERED, That the petitioners' motion for entry of decision, with computation attached, be filed as of this date and that hearing on motions for entry of decision filed by both parties is set for Washington, D. C., at 10 A. M., December 11, 1957.

Entered November 20, 1957.

JOHN E. MULRONEY,
Judge.

ORDER AND DECISION APPEALED

Pursuant to Order of this Court dated November 20, 1957, hearing was had upon the motions of both parties for the entry of decision and at the conclusion of the hearing the matter was considered and the Court took the same under advisement.

It appears to the Court that what petitioner Joseph N. Romm is now seeking is a new Rule 50 computation based on an argument which raises new issues. The record shows the parties filed an agreed computation of the tax on July 24, 1956, after the Opinion of this Court, and the matter is now here on the Mandate of the United States Court of Appeals for the Fourth Circuit which commands, in part:

> It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is hereby, modified as set forth in the opinion of the Court filed herein and, as so modified, it is affirmed;
>
> * * *

The Opinion of the Court of Appeals (Joseph N. Romm and Helen K. Romm, his wife, v. Commissioner of Internal Revenue, No. 7366, Decided May 27, 1957) shows quite clearly that the modification ordered was as to the allocation of a payment of $831.24 with respect to the 1946 deficiency and as to the liability of taxpayer's wife. This modification is reflected in respondent's computation accompanying his motion for decision, which computation we hold to be correct, and the following will be the

DECISION

> Pursuant to the Mandate of the United States Court of Appeals for the Fourth Circuit, filed July 1, 1957, whereby the decision of this Court in this cause was modified and the motions for entry of decision filed by the respondent herein on October 31, 1957, it is

ORDERED: That the above entitled case, in so far as it purports to relate to Helen K. Romm, be dismissed as to her, and it is

ORDERED and DECIDED: That there are no deficiencies in income tax and additions to tax, or overpayments therefor, due from or to her for the taxable years 1942 to 1946, inclusive; and it is, further

ORDERED and DECIDED: That there are now unpaid deficiencies in income tax and additions to the tax due from petitioner Joseph N. Romm, as follows:

Year	*Income Tax*	*Additions to Tax*
1942	$ 2,159.56	$ 1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,887.27

JOHN E. MULRONEY,
Judge.

Entered Dec. 17, 1957.

PETITION FOR REVIEW

To The Honorable, The Judges of the United States Court of Appeals for the Fourth Judicial Circuit:

JOSEPH N. ROMM hereby petitions the United States Court of Appeals for the Fourth Judicial Circuit to review the decision of The Tax Court of the United States entered on the 17th day of December, 1957, ordering and deciding that there are deficiencies in income taxes and additions thereto the same as follows:

1942	$2,159.56 deficiency	$1,079.78 addition
1943	2,145.22 deficiency	1,072.61 addition
1944	15,745.65 deficiency	7,872.83 addition
1945	16,853.67 deficiency	8,426.84 addition
1946	3,613.85 deficiency	12,887.27 addition

This petition is filed pursuant to the provisions of section 7482, Internal Revenue Code of 1954 (26 USCA sec. 7482).

The income tax returns involved were filed with the Collector (now District Director) of Internal Revenue, Baltimore, Maryland.

Joseph N. Romm
(Joseph N. Romm)
6613 Eastern Avenue,
Takoma Park, Md.

Warren W. Grimes
(Warren W. Grimes)
Shoreham Building, Washington 5, D. C.,
Attorney for petitioner on review.

No. 239

Supreme Court, U.S.
FILED
JUN 31 1957
JOHN T. FEY, Clerk

No. 7366

In the United States Court of Appeals for the Fourth Circuit

JOSEPH N. ROMM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF AND APPENDIX FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General
LEE A. JACKSON,
I. HENRY KUTZ,
ARTHUR I. GOULD,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Previous opinions	1
Jurisdiction	1
Question presented	2
Statutes and rule involved	2
Statement	4
Summary of argument	6
Argument:	
The Tax Court correctly modified its decision in accordance with the judgment and mandate of this Court	6
Conclusion	11
Appendix:	
Docket Entries	12

CITATIONS

Cases:	
Bankers Coal Co. v. *Burnet*, 287 U. S. 308	7
Commissioner v. *Superior Yarn Mills*, 228 F. 2d 736	7
Davison v. *Commissioner*, 60 F. 2d 50	8
Drybrough v. *Commissioner*, 238 F. 2d 735	10
Fifth Street Building v. *Commissioner*, 77 F. 2d 605	8
Helvering v. *Kendrick Coal & Dock Co.*, 72 F. 2d 330	9
Holland v. *United States*, 348 U. S. 121	10
Peavy-Byrnes Lumber Co. v. *Commissioner*, 86 F. 2d 234	9
Polizzi v. *Commissioner*, 247 F. 2d 875	9
Romm v. *Commissioner*, decided April 30, 1956	6
Romm v. *Commissioner*, 245 F. 2d 730, certiorari denied, 355 U. S. 862	4, 5, 7
Shanis v. *Commissioner*, 213 F. 2d 151	8
Stark v. *Commissioner*, 29 T. C. No. 17	10
Stein v. *Commissioner*, 25 T. C. 940	10
Stern Brothers & Co. v. *Commissioner*, 16 T. C. 295	10

Statutes:

	Page
Internal Revenue Code of 1939, Sec. 23 (26 U. S. C. 1952 ed., Sec. 23)	3, 11
Internal Revenue Code of 1954:	
Sec. 7481 (26 U. S. C. 1952 ed., Supp. II, Sec. 7481)	9
Sec. 7482 (26 U. S. C. 1952 ed., Supp. II, Sec. 7482)	2, 8, 9
Miscellaneous:	
Rev. Rul. 107, 1953–1 Cum. Bull. 178	10
Rev. Rul. 57–332, 1957–29 Int. Rev. Bull. 8	10
Rules of Practice of the Tax Court of the United States, Rule 50	3, 5, 6, 7, 8, 9

In the United States Court of Appeals for the Fourth Circuit

No. 7366

JOSEPH N. ROMM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF AND APPENDIX FOR THE RESPONDENT

PREVIOUS OPINIONS

The memorandum findings of fact and opinion of the Tax Court rendered after the hearing on the merits are not officially reported. The opinion of this Court modifying the Tax Court opinion is reported at 245 F. 2d 730, certiorari denied, 355 U. S. 862. The subsequent order and decision of the Tax Court (R. 12a–13a)[1] entered in order to carry out the mandate of this Court are not officially reported.

JURISDICTION

This appeal, involving an order and decision of the Tax Court conforming its previous decision to the judgment and mandate of this Court, is taken from

[1] Record references are to the Appendix to taxpayer's brief.

the order and decision of the Tax Court entered December 17, 1957. (R. 1, 12–13.) Petition for review was filed on January 15, 1958. (R. 13–14; Appendix, *infra*.) The jurisdiction of this Court is invoked under Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Did the order and decision of the Tax Court, in modifying its earlier decision, correctly carry out the mandate of this Court?

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1954:

SEC. 7482. COURTS OF REVIEW.

(a) *Jurisdiction.*—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * * * *

(c) *Powers.*—

(1) *To affirm, modify, or reverse.*—Upon such review, such courts shall have power to affirm or, if the decisions of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or

without remanding the case for a rehearing, as justice may require.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7482.)

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) *Taxes generally.*—

(1) [As amended by Sec. 202, Revenue Act of 1941, c. 412, 55 Stat. 687] *Allowances in general.*—Taxes paid or accrued within the taxable year, except—

(A) Federal income taxes:

* * * * *

(26 U. S. C., 1952 ed., Sec. 23.)

Rules of Practice of the Tax Court of the United States (Revised January 1957):

Rule 50. *Computations by parties for entry of decision.*—(a) *Agreed computations.*—Where the Court has filed its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to the report of the Court, they or either of them shall file promptly with the Court an original and two copies of a computation show-

ing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision.

* * * * *

(c) *Limits on argument under this Rule.*— Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for retrial or reconsideration.

STATEMENT

This Court issued a mandate to the Tax Court remanding this case for further proceedings not inconsistent with the opinion of this Court. (R. 1.) In the opinion of this Court the lower court's decision was modified, as follows (*Romm* v. *Commissioner*, 245 F. 2d 730, 736 (C. A. 4th), certiorari denied, 355 U. S. 862):

> The case is remanded to the Tax Court for modification of the order as to interest on the deficiency and as to the liability of taxpayer's wife. In all other respects, the decision is affirmed.

The Commissioner in the Tax Court and in this Court conceded that the wife was not liable; she was found jointly liable for the husband's deficiencies through an inadvertant error. The interest on the deficiency

related to a payment made by taxpayer on his 1946 deficiency. By allocating this amount to the deficiency rather than the fraud penalty interest would stop running on the $831.24. *Romm* v. *Commissioner*, *supra*, pp. 732, 736. The Tax Court followed the mandate of this Court and ordered the deficiencies in income tax and additions to the tax in the following amounts (R. 13):

Year	Income tax	Additions to tax
1942	$2,159.56	$1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,987.27

The original tax deficiency and additions to tax were determined by a Tax Court Rule 50 computation. This occurred on July 24, 1956, when subsequent to the opinion of the Tax Court, the taxpayer and the Commissioner filed an agreed computation of the tax. (R. 12.)

After the rendition of this Court's mandate taxpayer filed a motion for entry of decision based upon Tax Court Rule 50 computations. (R. 4–11.) The Tax Court rejected this computation stating that taxpayer was seeking "a new Rule 50 computation based upon an argument which raises new issues." (R. 12.) Taxpayer has now petitioned this Court for review of the decision of the Tax Court. (R. 13–14.)

SUMMARY OF ARGUMENT

This Court has reviewed the decision of the Tax Court in this case. The case was remanded to the Tax Court for modification as to two matters. The Tax Court followed the mandate of this Court and accordingly modified its decision as to the two matters.

Taxpayer had entered into an agreed computation of tax under Tax Court Rule 50 upon which the initial decision of the Tax Court was based. However subsequent to the remand of the case by this Court, taxpayer again submitted Rule 50 computations in which he raised new issues inconsistent with the opinion of this Court. The Tax Court properly did not accept taxpayer's computations raising new issues, but instead correctly followed the mandate of this Court and modified its prior computations directly in accordance with the two matters as ordered by this Court.

Furthermore, in addition to taxpayer's argument being improper it is without substance. The cases upon which he relies are authority for an entirely different proposition than what taxpayer asserts. Taxpayer's argument indicates his misapprehension as to the mathematical computations utilized in a net worth method of reconstructing income.

ARGUMENT

The Tax Court correctly modified its decision in accordance with the judgment and mandate of this Court

The Tax Court filed its opinion in this case on April 30, 1956. *Romm* v. *Commissioner* (1956 P. H. T. C. Memorandum Decisions, par. 56, 104). Under

Tax Court Rule 50, *supra,* the parties agreed as to computation for entry of decision on July 24, 1956, and on July 26, 1956, decision was entered. On October 22, 1956, taxpayer petitioned this Court for review of the Tax Court decision (Appendix, *infra.*) This Court decided the case on May 27, 1957, affirming the court below with the exception of two matters as to which the Tax Court decision was to be modified. *Romm* v. *Commissioner,* 245 F. 2d 730 (C. A. 4th), certiorari denied, 355 U. S. 862. This Court issued its mandate to the Tax Court on June 29, 1957 remanding the case to that court for further proceedings not inconsistent with the opinion of this Court. (R. 1.) Accordingly, the Tax Court entered an order and decision on December 17, 1957.

In the mandate proceeding before the Tax Court and in his instant brief, taxpayer urges that for each taxable year his income tax deficiencies, fraud penalties, and statutory interest thereon become a liability to be reflected in taxpayer's net worth thereby, reducing the tax liability for each respective succeeding year. (Br. 7–11.) The Tax Court answered taxpayer's claim by stating that he was requesting a new Tax Court Rule 50 computation based on an argument that raises new issues. (R. 12.) It is a well-founded principle that the only issues that may be raised on a hearing under Rule 50 are those that are strictly confined to the correct computation of the deficiency resulting from the decision and no new issues may be raised. Tax Court Rule 50 (*e*); *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308; *Commissioner* v. *Superior*

Yarn Mills, 228 F. 2d 736 (C. A. 4th); *Shanis* v. *Commissioner*, 213 F. 2d 151 (C. A. 3d); *Fifth Street Building* v. *Commissioner*, 77 F. 2d 605 (C. A. 9th); *Davison* v. *Commissioner*, 60 F. 2d 50 (C. A. 2d). Certainly the matter taxpayer now introduces is a new matter relating to the net worth computations that determined taxpayer's deficiency. Furthermore, taxpayer has already entered into an agreed computation of his tax. The Tax Court decision entered July 26, 1956, was in conformity with this agreed computation provided in Rule 50.

As the Tax Court stated the proceeding here involves computing the tax liability of the taxpayer in accordance with the mandate of this Court that modified the Tax Court decision as to two matters. (R. 12.) The decision of this Court reviewed all matters appealed by the taxpayer from the Tax Court decision and in accordance with Section 7482 (c) (1) of the 1954 Internal Revenue Code, *supra*, remanded this case for modification as to the two specific matters. *Romm* v. *Commissioner*, *supra*, p. 736. Indeed in its opinion (p. 732) this Court set forth precisely the amount of tax and additions to tax determined by the Tax Court for each year involved and affirmed except as to these minor matters. The mandate of this Court ordered the decision of the Tax Court to be modified in accordance with the opinion of this Court. That is exactly what the Tax Court did. It recomputed taxpayer's liability modifying only as to the two matters ordered by this Court. A lower court is without au-

thority to pass upon new matters [2] but must confine itself to the directions ordered in the mandate. *Peavy-Byrnes Lumber Co.* v. *Commissioner*, 86 F. 2d 234 (C. A. 5th), *Helvering* v. *Kendrick Coal & Dock Co.*, 72 F. 2d 330 (C. A. 8th).

Furthermore, the issue taxpayer is improperly presenting is without substance. The cases relied upon by taxpayer do not hold that the deficiency, fraud penalty, and interest thereon are to be deducted from taxpayer's net worth when employment of increase in net worth, as here, demonstrates that these deficiencies and additions to the tax are owing, and never

---

[2] Taxpayer contends that under Section 7481 (4) of the 1954 Code the first decision of the Tax Court was "stripped * * * of its finality as though it had not been rendered". (Br. 5.) The above cited Code provisions relates only to rehearings ordered by the Court of Appeals. The Appellate Court may or may not remand a case for a new hearing. Section 7482 (c) (1), *supra*. It did not do so in the instant case, but affirmed in all except two minor respects.

[3] Taxpayer relies heavily upon *Polizzi* v. *Commissioner*, 247 F. 2d 875 (C. A. 6th). In that case the question as to whether taxpayer filed a joint or separate return was not considered by the Tax Court. The Court of Appeals stated that this matter could not be considered in the Rule 50 computation because it was a new matter; however, it should be considered under Tax Court Rule 19 providing for further hearings. The Court allowed taxpayer to file this motion out of time because the equities of the case required it, since in his deficiency notice the Commissioner had not asserted joint liability.

In the instant case the Rule 50 computation has been agreed upon by both parties, this Court has decided all matters raised by taxpayer's appeal and has ordered the prior decision of the Tax Court to be modified in only two respects. This Court did not deem it necessary to have a further hearing on any matters. The *Polizzi* case, *supra*, is not in any way in point here.

have been paid. The cases and revenue rulings relied upon by taxpayer are authority for a very different proposition, namely, that in determining a corporation's earnings and profits for the purpose of deciding the nature of the distributions (dividend or capital) to a corporate shareholder, income tax deficiencies together with the interest and penalties thereon are to be deducted from earnings and profits. *Drybrough* v. *Commissioner*, 238 F. 2d 735 (C. A. 6th); *Stein* v. *Commissioner* 25 T. C. 940, acq. 1957 Int. Rev. Bull. 29–7; *Stern Brothers & Co.* v. *Commissioner*, 16 T. C. 295, acq. 1951–2 CB 4; *Stark* v. *Commissioner*, 29 T. C. No. 17; Rev. Rul. 107, 1953–1 Cum. Bull. 178; Rev. Rul. 57–332, 1957–29 Int. Rev. Bull. 8. This is an entirely different proposition than the one taxpayer attempts to assert. Taxpayer surely can not claim in reduction of his assets and thus of his net worth for the taxable years amounts of federal taxes and penalties which he not only did not pay during these years, but liability for which he failed to admit, but contested throughout.

As a matter of fact, if taxpayer had paid the taxes and penalties in dispute during the taxable years, they would have constituted additions to his net worth. As the Supreme Court explained the net worth method in *Holland* v. *United States*, 348 U. S. 121, 125:

> The taxpayer's non-deductible expenditures, including living expenses, are *added* to these increases, [the adjusted net values of taxpayer's assets at the beginning and end of each of the years involved] and if the resulting figure for any year is substantially greater than the

> taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income [emphasis ~~and parenthesis~~ added].

Surely federal income taxes are non-deductible expenditures under the Internal Revenue Code Section 23 (c) (1) (a) of the 1939 Code, *supra* (now Section 164 (b) (1) of the 1954 Code.) Clearly federal income taxes, a non-deductible expenditure, is added to, not deducted from, net worth increases for purpose of determining a deficiency when the net worth method is utilized.

CONCLUSION

The order and decision of the Tax Court was in conformity with the mandate of this Court and should be affirmed.

CHARLES K. RICE,
Assistant Attorney General,
LEE A. JACKSON,
I. HENRY KUTZ,
ARTHUR I. GOULD,
Attorneys,
Department of Justice,
Washington 25, D. C.

MARCH 1958.

APPENDIX

Docket No. 55682

APPEARANCES:

Joseph N. Romm and Helen K. Romm, Husband and Wife, Petitioners. For petitioners: Warren W. Grimes, Esq., P. Bateman Ennis, Esq., Frank A. Spicer, C.P.A. *vs.* Commissioner of Internal Revenue, Respondent. For respondent: William Schwerdtfeger, Esq.

Docket Entries

1954

Dec. 22—Petition received and filed. Taxpayer notified. Fee paid. 1 copy rec'd.

Dec. 27—Copy of petition served on General Counsel.

Dec. 22—Notice of appearance of Warren W. Grimes, Frank A. Spicer, as counsel filed. 2 copies rec'd Copies served 12/27/54.

Dec. 22—Request for Circuit hearing in Washington, D. C. filed by taxpayer. Granted 1/4/55.

1955

Jan. 26—Appearance of P. Bateman Ennis as counsel filed.

Jan. 28—Answer filed by General Counsel.

Feb. 1—Copy of answer served on taxpayer, Washington, D. C.

Feb. 9—Reply to answer filed by taxpayer. Copy served.

1955—Continued

Aug. 16—Hearing set December 5, 1955, Washington, D. C.

Sept. 12—Motion for further and better statement filed by taxpayer. Served.

Sept. 13—Hearing set 10/19/55 on petitioner's motion. Copy served.

Sept. 20—Motion to withdraw motion for further and better statement filed by petitioner. 9/23/55 granted.

Sept. 26—Motion to amend petition, amended petition lodged, filed by petitioner.

Sept. 27—Motion to amend petition granted, amended petition filed.

Sept. 28—Copy of motion and amended petition served on General Counsel.

Oct. 11—Answer to amended petition filed by General Counsel. 10/12/55 copy served.

Oct. 18—Reply to answer to amended petition filed by petitioner. 10/19/55 copy served.

Dec. 12—Hearing had before Judge Mulroney on merits. Stipulation of Facts with exhibits 1 thru 8 and A thru J filed. Briefs Jan. 26, 1956; replies Feb. 27, 1956.

Dec. 23—Transcript of Hearing 12/12/55 filed.

1956

Jan. 25—Brief filed by taxpayer. 1/27/56 copy served.

Jan. 26—Brief filed by respondent. Served 1/27/56.

Feb. 24—Reply Brief filed by taxpayer. Served 2/27/56.

Feb. 27—Reply Brief filed by Respondent. Served 2/28/56.

1956—Continued

Apr. 30—Memorandum findings of Fact and Opinion filed. Mulroney J. Decision will be entered under Rule 50. Served 4/30/56.

Jul. 24—Agreed computation for Entry of Decision filed.

Jul. 26—Decision entered, Judge Johnson, Div. 10. Served 7/27/56.

Aug. 8—Order Fixing Amount of Bond at $106,000.00, entered. Served 8/10/56.

Oct. 22—Petition for review by U. S. Court of Appeals, Fourth Circuit, filed by petitioner.

Oct. 22—Proof of service filed.

Nov. 21—Statement of Appellants Points, with proof of service thereon, filed.

Nov. 21—Designation of Contents of Record on Review, with proof of service thereon, filed.

Nov. 23—Order extending time for filing record on review and docketing petition for review to 1/20/57 entered. Served 11/26/56.

Dec. 27—Transcript of record in duplicate sent to U. S. C. A. 4th, Circuit.

1957

Jul. 1—Mandate from U. S. Circuit Court of Appeals, 4th Circuit modifying Tax Court's decision and remanding to Court for further proceedings filed.

Jul. 3—Order that proceeding is placed on the Motions Calendar, Aug. 21, 1957 for consideration of any recomputation, stipulation or motion which may be filed on or before Aug. 14, 1957, entered. Served 7/8/57.

Aug. 13—Motion to strike case from the 8/21/57 motions calendar, filed by Petr. granted 8/14/57.

1957—Continued

Aug. 15—Motion of Aug. 13 served.

Oct. 31—Motion by respdt. for entry of decision. (Helen K. Romm)

Oct. 31—Motion by respdt. for entry of decision. (Joseph N. Romm)

Nov. 4—Decision entered, Judge Mulroney. served 11/6/57.

Nov. 20—Petr's motion for entry of decision with computation attached. served 11/21/57.

Nov. 20—Motion by petr. for stay, hearing, reconsideration and leave to file under Rule 50.

Nov. 20—Order that petrs. motion for entry of decision, with computation attached, be filed this date, and that hearing on motions for entry of decision is set Dec. 11, 1957, at Wash., D. C. served 11/21/57.

Dec. 11—Hearing on motions for entry of decision. Referred Judge Mulroney.

Dec. 17—Order and decision entered, Judge Mulroney.

1958

Jan. 15—Pet. for review with proof of service thereon, filed by Petr. U. S. C. A. 4th.

Jan. 28—Statement of Points with proof of service thereon, filed.

Jan. 28—Designation of contents of record on review, with proof of service thereon, filed.

U. S. GOVERNMENT PRINTING OFFICE: 1959

LIBRARY
PREME COURT. U. S.

Supreme Court, U.S.
JUL 31 1958
CLERK

IN THE

Supreme Court of the United States

October Term 1957 - 1958

No. 239

JOSEPH N. ROMM, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT

WARREN W. GRIMES,

INDEX

	Page
I. Opinions below	1
II. Jurisdictional statement	2
III. Questions presented	2
IV. Statutes and rule involved	2
V. Statement of the case	4
VI. Reasons relied upon for allowance of the writ	6
VII. Argument:	
(a) The mandate did not bar a correct recomputation	6
(b) No new issue was raised	8
(c) The Tax Court's decision as affirmed was based upon error as to what the record showed	11
VIII. Conclusion	11

Table of Cases Cited

Black Motor Co. v. Comm., 125 F.2 977 ..... 6, 9
Chatham Phenix National Bank & Trust Co. v. Helvering, 87 F.2 547, 550 8
Commissioner v. Brandegee, 23 F.2 58, 60-61 9
Comm. v. Central National Bank of Cleveland, 119 F.2 470 9
Commissioner v. Ray, 88 F.2 891; *Cert. Denied* 57 S.Ct. 942 ..... 6, 9, 10
Commissioner v. Superior Yarns Mills, 228 F.2 736 ..... 6, 8
Commissioner v. Wells, 132 F.2 405, 408 8
Davidson v. Comm. 60 F.2 50, 52 (5) 6, 8
Drybrough v. Comm., 238 F.2 735 ..... 9, 10, 11
Great Northern Ry. Co. v. Comm., 40 F.2 372 8
Gunn, C.C. v. Comm., 247 F.2 359 11
Helvering v. Edison Securities Corp., 78 F.2 85 ..... 6, 7, 8, 9
Helvering v. Kendrick Coal & Dock Co. 72 F.2 330 10

Page

Holland v. *U. S.* 75 S. Ct. 127; 348 U.S. 121; 99 L. Ed. 150 ..... 6, 8, 10
Hormel v. *Helvering*, 61 S.Ct. 719; 312 U.S. 552 85 L. Ed. 1037 ..... 6, 8, 9
Peavy-Barnes Lumber Co., v. *Comm.* 86 F.2 234 10
Polizzi v. *Comm.* 247 F.2 875 7
Romm v. *Comm.*, 245 F.2 730; 15 TCM 526 1-2
Sanford Fork & Tool Co., 16 S.Ct. 291; 160 U.S. 248, 256; 40 L. Ed. 414, 416 7
Scripps v. *Comm.*, 96 F.2 492 9
Stein, Estate of Esther M. v. *Comm.* 25 TC 940 ..... 5, 9
Stern Bros. & Co. v. *Comm.* 16 TC 295 ..... 5, 9

In The

Supreme Court of the United States

October Term 1957

No. .....

Joseph N. Romm, *Petitioner*

v.

Commissioner of Internal Revenue, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT

To the Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

1. Joseph N. Romm respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Judicial Circuit, which affirmed and modified in part a decision of the Tax Court of the United States involving recomputation of income tax liabilities following remand.

I. OPINIONS BELOW

2. The opinions of said Court of Appeals and Tax Court have not yet been reported, but are reproduced in the appendix hereto at pages Ap. 7 and Ap. 5 respectively. The first opinion of the Tax Court is reported in 15 TCM 526; the first opinion of the Fourth Circuit,

modifying in part and otherwise affirming, is reported in 245 F.2 730.

II. JURISDICTIONAL STATEMENT

3. Jurisdiction here is invoked under 28 USC, Sec. 1254 (1); Act of June 5, 1948, c. 646; 62 Stat. 928. The decision and mandate sought to be reviewed were entered June 17, 1958.

III. QUESTIONS PRESENTED

4. (a) Did the Court of Appeals err in holding that, under its mandate for further proceedings not inconsistent with its opinion, the Tax Court could not, in recomputing the liability as required by the modifications, arrive at the correct dollar liability under the law?

(b) Did the Court of Appeals and Tax Court err in holding that a new issue was raised in the recomputation proceeding under Rule 50 of the latter court?

(c) Did the Tax Court err in basing its figures upon a first computation which petitioner agreed was in accordance with its *first* opinion, with which opinion however petitioner did not agree and which the Court of Appeals modified?

Petitioner contends all of the above questions should be answered in the affirmative.

IV. STATUTES AND RULE INVOLVED

5. (a) 26 USC Sec. 7482 *Courts of Review:*

"Jurisdiction the United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court".

(b) 26 USC Sec. 7482 (c) (1) (1954 IRC):

"Powers—Upon such review, such courts shall have power to affirm or if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require."

(c) 26 USC, Sec. 7481 (3) (b) (4) (1954 IRC):

"Rehearing—If the case is remanded by the United States Court of Appeals to the Tax Court for a rehearing, then the decision of the Tax Court rendered upon such rehearing shall become final in the same manner as though no prior decision of the Tax Court has been rendered."

(d) Rule 50, *Tax Court of the United States.*
"*Computations by Parties for Entry of Decision.*

(a) *Agreed computations*—Where the Court has filed its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Courts determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to the report of the Court, they or either of them shall file promptly with the Court an original and 2 copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision.

(b) *Procedure in absence of agreement*—If, however, the parties are not in agreement as to the amount of the deficiency or overpayment to be entered as the decision in accordance with the report of the Court, either of them may file with the Court a computation of the deficiency or overpayment believed by him to be in accordance with the report

of the Court. The Clerk will serve a copy thereof upon the opposite party, will place the matter upon a motion calendar for argument in due course, and will serve notice of the argument upon both parties. If the opposite party fails to file objection, accompanied by an alternative computation, at least 5 days prior to the date of such argument, or any continuance thereof, the Court may enter decision in accordance with the computation already submitted. If in accordance with this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the Court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court will determine the correct deficiency or overpayment and enter its decision.

(c) *Limits on argument under this Rule.*—Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for retrial or reconsideration.

V. STATEMENT OF THE CASE

6. The income tax case was based upon the Commissioner's use of the net worth increase method. Petitioner stipulated that the use of that method was justified, but disagreed with the resultant figures, and evidence was accepted at the trial as to portions excepted to. The Petition showed the Commissioner's assertions of deficiencies and penalties by years and amounts, the answer admitted the assertions and the Tax Court's opinion found such assertions had been made—by years and amounts. The decision was entered April 30, 1956 (15 TCM 526). The Commissioner filed his computation of the liability figures under Rule 50. Petitioner agreed

such figures were correct under the then opinion and that only. The Tax Court entered its decision for such amounts. Petitioner asked review, on several grounds, by the Fourth Circuit,—Sobeloff and Soper, Circuit Judges and Hutcheson, District Judge, holding the Tax Court erred in holding petitioner's wife jointly liable, also in its allocation of two items to interest rather than to deficiency, and affirmed it otherwise. (245 F.2 730). The case was remanded for further proceedings not inconsistent with its opinion. The judgment and mandate appear in the appendix hereto, page Ap. 1. The only published report of the opinion appears in 57 US Tax Cases (CCH) decision 9757, page 57,773. The decision was issued May 27, 1957.

7. Thereafter (July, 1957) the Commissioner published a new ruling (57-332, IRB 1957, 29-8), revoking and reversing an earlier ruling and acquiescing in the principle of the decisions in *Stern Bros. & Co.*, 16 TC 295, and *Estate of Esther M. Stein*, 25 TC 940, holding that, in computing net worth where a fraudulent return had been filed, the amounts of the deficiencies and penalties later asserted became debts of the taxpayer on the return-filing date and reduced net worth as any other debt.

8. The Commissioner on October 31, 1957, moved for entry of decision in the Tax Court under his new computation under the mandate, (Ap. 1), petitioner not being served. The Tax Court entered its decision with final liability figures as so asked. Ap. 2. Petitioner filed motion for stay, hearing, reconsideration and leave to file his own figures under Rule 50, (Ap. 3). The Tax Court vacated its decision and set petitioner's motions for hearing Ap. 5, which was had. On December 17, 1957, the Tax Court entered its final decision, (Ap. 5) holding petitioner sought a new rule 50 computation, that a new issue was raised, that the parties had agreed to the tax figures under the first Tax Court opinion and it adopted the liability figures asked by the Commissioner.

9. Petition for review by the Fourth Circuit followed (Ap. 7) and the latter court's opinion, affirming the Tax Court, was entered June 17, 1958. Ap. 7-9.

VI. REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

10. The decision below conflicts with *Hormel* v. *Helvering*, 61 S. Ct. 719; 312 U.S. 552; 85 L. Ed. 1037, headnote subjects 1, 2 and 3.

11. The decision below conflicts with instructions in *Holland* v. *U. S.*, 75 S. Ct. 127; 348 U.S. 121; 99 L. Ed. 150, on the duties of courts dealing with tax cases resting upon use of the net worth method.

12. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court—since a substantial portion, if not majority, of tax fraud cases now are based upon the net worth method. *Holland* v. *U. S. supra.*

13. The decision below is in conflict with *Davidson* v. *Commissioner* (CCA-2), 60 F.2 59, 52 (5); *Commissioner* v. *Ray*, (CCA-7) 88 F.2 891, cert. denied 57 S. Ct. 942; and *Black Motor Co.* v. *Commissioner* (CCA-6) 125 F.2 977.

14. The decision below so far departs from the accepted and usual course of judicial proceedings and sanctioned such a departure by the Tax Court as to call for an exercise of this Honorable Court's power of supervision. See *Helvering* v. *Edison Securities Corp.*, 78 F.2 85 and *Commissioner* v. *Superior Yarns Mills*, 228 F.2 736—both of the same Fourth Circuit.

VII. ARGUMENT

(a). *The mandate below did not bar a correct recomputation*

15. The computation of the dollar amount of tax liability, after the determination of issues, is the exclusive

function of the Tax Court. It is not a subject for submission to a court of appeals and was not so submitted in the first appeal. The mandate was "for further proceedings not inconsistent with the opinion." The only proceeding then in order was under Rule 50, under which, repeated in the Rule, the liability computed must be "correct". This was a matter "left open" and which a mandated court may consider and decide. *Sanford Fork & Tool Co.*; 16 S. Ct. 291; 160 U.S. 248, 256; 40 L. Ed. 414, 416. Nothing whatever was asked in the Rule 50 proceeding other than correct liability figures under the law as established by the Court decisions and formally accepted by the Commissioner. Most certainly nothing was asked "inconsistent with the opinion" of the Court of Appeals deciding the issues, for that left open the figure liability.

16. Under 26 USC, Sec. 7481 (3) (b) (4), the Tax Court's decision after mandate, including the recomputation, was to be final as though no prior decision had been rendered. The mandate's phrase "for further proceedings" clearly covered the hearing under Rule 50 asked in petitioner's motion therefor. By the Fourth Circuit's own decisions, hearings under Rule 50 include the whole proceeding down to the final decision and held it was undoubted there was power to do full justice to the parties while they were still before the Board (Tax Court). *Helvering v. Edison Securities Corp., supra.*—involving liability figure changes first raised in the recomputation proceedings.

17. Judge Sobeloff misses completely the significance of *Polizzi v. Commissioner*, (CA 6) 247 F.2 875. He uses some of the factual reasons for the Court's holding there, rather than the holding itself, which was (p. 877) that there was a failure to do justice by the Tax Court's failure to consider the new point where it was material "in the computation of the tax", and that the taxpayer's posi-

tion *could* have been allowed, even though untimely, because otherwise there would have been, as here, "a wrongful determination of the liability". That decision quotes from *Chatham Phenix Nat. Bank and Trust Co. v. Helvering*, 87 F.2 547, 550 on lower court action when necessary to meet the ends of substantial justice and where a taxpayer suffers through a wrongful determination of his tax liability. Also the quotation from *Commissioner v. Wells*, 132 F.2 405, 408, as to rules of practice and procedure being devised to promote the ends of justice. He overlooked what his own Court had done in *Helvering v. Edison Securities Corp.*, *supra* and *Commissioner v. Superior Yarns Mills*, *supra*. He also overlooked this Court's holding in *Hormel v. Helvering*, *supra*, that orderly rules of procedure do not require sacrifice of the rules of fundamental justice, and your citation of 26 USCA—1940 ed., sec. 1141 (c) (1), now 26 USCA sec. 7482 (c) (1) as to appellate courts' powers where the Tax Court's decision is not in accordance with law and "where justice may require." He disregarded your caution in *Holland v. U. S. supra*, as to courts reviewing net worth cases.

18. At no time before the Tax Court did the Commissioner claim a new issue had been raised, nor did he question the doctrine established in *Stern* and *Stein*, *supra*. His entire argument was that the wording of the mandate precluded any figure change on other than the issues modified, which is the Court of Appeals answer; but it still leaves and left "a wrongful determination of tax liability".

(b) *No new issue was raised*

19. The Tax Court held that petitioner sought a new Rule 50 computation in an argument raising new issues. Ap. 5. *Davidson v. Commissioner*, (CCA-2) *supra*, holds that new issues, *other than those relating to computation*, cannot be raised under Rule 50, citing *Great Northern Ry. Co. v. Comm.* (CCA 8) 40 F.2 872. New issues, ov-

ered by neither pleadings nor evidence, have been directed by appellate courts to be considered in a number of instances as to computations under such Rule. *Commissioner* v. *Ray*, (CCA-7) *supra; Helvering* v. *Edison Securities Co.*, (CA-4), *supra; Commissioner* v. *Central Nat. Bank of Cleveland*, (CCA-6), 119 F.2 470 citing *Hormel*, supra. In all of them new evidence was necessary. In the present case, no evidence was necessary, since the assertion figures appeared several times in the pleadings and findings.

20. An issue arises only where a material assertion in a petition or answer is met with opposition. At no time during the Rule 50 proceeding did the Commissioner oppose our claim that the asserted deficiencies and penalties appearing in the record should be accepted as just and legal debts which must be recognized as reductions or subtractions in computing net worth increases. *Stern Bros.* v. *Comm., and Estate of Esther Stein*, both *supra*. He had published his formal ruling acquiescing in the principle as established by those decisions, that later assertions of deficiencies and penalties are debts due on return-filing date in cases of fraud, as all other legal debts, to be subtracted from the assets.

21. Where intervening decisions have put a different face upon the litigation, although the points were not raised below, there is no doubt of the power to consider them. *Commissioner* v. *Brandegee*, (CCA-1); 23 F.2 58, 60-61. In addition to the Commissioner's intervening ruling, next above, see also *Dalbrough* v. *Commissioner* CCA-6 238 F.2 735. This is true particularly where, as here, no new or amplified factual determination is needed. *Black Motor Co.* v. *Commissioner* (CCA-6-125 F.2 977 citing *Scripps* v. *Commissioner* 96 F.2 492-496, where the issue was neither before the Board nor assigned before the appellate court.

22. *Peary-Byrnes Lumber Co.* v. *Commissioner* (CCA-5) 86 F.2 234, cited in the opinion below, has no analogy, since the mandate there directed specifically that a fixed *amount* be used to determine the liability and (on the second appeal) that the point raised below involved no mere matter of accounting but necessitated pleading amendment and new evidence.

23. Nor does *Helvering* v. *Kendrick Coal & Dock Co.* (CCA-8) 72 F.2 330, though cited, support the opinion below. In fact it supports petitioner here. There the mandate also was for further proceedings not inconsistent with the opinion. The Board (Tax court) heard no new evidence but made additional findings from the record. The Commissioner's position was, as here, the findings were not in conformity with the mandate. The appellate court ruled there was no disobedience but that the mandate clearly left the Board to perform completely a duty which had been imperfectly performed and the Board's new finding was contrary to the conclusive evidence. In our present case, no new fact finding and no new evidence were involved. See *Commissioner* v. *Ray supra.*

24. Judge Sobeloff is far afield in his holding that whether income is ascertained by the net worth computation or otherwise it is fundamental a taxpayer may not deduct from his annual taxable (*sic*) income his federal income tax and penalties. First, it is fundamental that the deductions in the statutes are from *gross income*. Second, neither income nor deductions in the statutory sense are a part of a net worth increase computation, and *Drybrough, supra* shows that neither accrual nor cash bases are so involved. The income determined by the method is a purely theoretical rather than a statutory or actual one, *Holland* v. *U. S. supra.* Third, no deduction for income taxes can be claimed unless they are paid. They were not here paid and it was so found as a fact. Fourth, the amounts were claimed as debts to be sub-

tracted in computing that "true financial status" (*Drybrough*) and "business and economic reality" (*C. C. Gunn* v. *Commissioner*, 247 F.2 359) which are the objectives of the net worth increase method.

(c) *The Tax Court's Decision as Affirmed is based upon error as to what the record showed.*

25. The Tax Court's order and decision (Ap. 5) is based in part on a misleading statement that there was an agreed computation of the tax following its first opinion,—indicating petitioner agreed it was correct. Under Rule 50, if there is agreement, such merely is that the computation is in accordance with the *then* opinion. But petitioner did not agree with the opinion, nor did the appellate court in part.

Later decisions and formal rulings altered the liability computation.

In any event, the first computation under the first Tax Court opinion had to be altered and a new computation made. Under 26 USC, sec. 7481 (3) (b) (4), this decision on the mandate was the only Tax Court final decision and the earlier decision and computation, in law, never had been rendered. To base this latest Tax Court decision and computation upon the first, never agreed to as the correct liability, was to rest upon what legally did not exist.

VIII. CONCLUSION

It is submitted respectfully that the decision of the United States Court of Appeals for the Fourth Judicial Circuit should be reviewed and, to such end, a writ of certiorari should be granted.

WARREN W. GRIMES,
640 Shoreham Building
Washington 5, D. C.,
Counsel for Petitioner.

APPENDIX INDEX

	Page Ap.
First Judgment and mandate of Court of Appeals	1
Respondent's motion for entry of Tax Court Decision	1
Tax Court decision thereon, entered November 4, 1957	2
Petitioner's motion to stay, for hearing, reconsideration and leave to file under Rule 50 T.C.	3
Petitioner's motion for decision	4
Tax Court order vacating its November 4, 1957, decision and setting for hearing	5
Order and decision of Tax Court appealed	5
Petition for review by Court of Appeals (4th)	7
Decision of Court of Appeals presently sought to be reviewed	8

FIRST JUDGMENT AND MANDATE

On Petition to Review the Decision of the Tax Court of the United States.

This Cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is hereby, modified as set forth in the opinion of the Court filed herein and, as so modified, it is affirmed; and that this cause be, and the same is hereby, remanded to The Tax Court of the United States for further proceedings not inconsistent with the opinion of the Court filed herein. May 27, 1957.

SIMON E. SOBELOFF
United States Circuit Judge.

RESPONDENT'S MOTION FOR ENTRY OF DECISION

Comes Now the Commissioner of Internal Revenue by his attorney, Nelson P. Rose, Chief Counsel, Internal Revenue Service, and pursuant to the opinion and mandate, issued in this case by the United States Court of Appeals for the Fourth Circuit shows the Court that the deficiencies and penalties found in its decision entered July 26, 1956, have been assessed under Section 7485, Internal Revenue Code of 1954, and have not been paid.

As indicated in the deficiency notice issued in this case on October 25, 1954, a copy of which is appended to the Petition as Exhibit A, the Commissioner allocated $821.84, part of the payment made on August 11, 1954 (Stip. of Facts Par. 2, filed December 12, 1955) to the fraud penalty for 1946. He also applied $10.00 of said payment

made prior to the issuance of the deficiency notice to accrued interest for 1946. As directed by the mandate the Court should find that there are now unpaid deficiencies in income tax and fraud penalties as follows:

Year	*Income Tax*	*Additions to Tax*
1942	$ 2,159.56	$ 1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,887.27

s NELSON P. ROSE
NELSON P. ROSE.
Chief Counsel
Internal Revenue Service

DECISION OF TAX COURT

(Entered November 4, 1957)

Pursuant to the Mandate of the United States Court of Appeals for the Fourth Circuit, filed July 1, 1957, whereby the decision of this Court in this cause was modified and the motions for entry of decision filed by the respondent herein on October 31, 1957, it is

ORDERED: That the above entitled case, in so far as it purports to relate to Helen K. Romm, be dismissed as to her, and it is

ORDERED and DECIDED: That there are no deficiencies in income tax and additions to tax, or overpayments therefor, due from or to her for the taxable years 1942 to 1946, inclusive; and it is further

ORDERED and DECIDED: That there are now unpaid deficiencies in income tax and additions to the tax due from petitioner Joseph N. Romm, as follows:

Year	Income Tax	Additions to Tax
1942	$ 2,159.56	$ 1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,887.27

JOHN E. MULRONEY,
Judge.

APPELLANT'S MOTION FOR STAY, HEARING, RECONSIDERATION AND LEAVE TO FILE UNDER RULE 50

Comes now Joseph N. Room, petitioner, by his attorney of record and respectfully moves for a stay of the judgment and decision of this Honorable Court entered November 4, 1957; for hearing and reconsideration thereof; and for leave to file counter-recomputation in disagreement thereto, under Rule 50 (b).

The reasons for this motion are that on October 29, 1957, the day the Supreme Court denied certiorari in this case, petitioner's counsel conferred with counsel for respondent and then was handed a rough draft of respondents proposed recomputation figures as to result only, but no recomputation upon which the same were based. Petitioner then stated he would disagree therewith, file his own recomputation and motion and discussed the legal reasons for such action. It then was orally agreed that such cross-computation would be prepared in detail and submitted to respondent with a letter brief in support thereof, both to be checked by respondent. Petitioner was occupied for several days upon the detailed recomputation and did submit the same to the respondent with the bases for showing that his proposed final figures were not "correct" as required by Rule 50. Nevertheless and without serving upon petitioner either a copy of his proposed motion for entry of judgment, motion for entry of

decision, proposed decision or any recomputation underlying them, respondent filed the same on October 31, 1957. The motions and proposed decision never were set down for a hearing or opposition and petitioner never given a reasonable opportunity to pursue the procedure prescribed in paragraph (b) of Rule 50—to petitioners substantial prejudice. Wherefore, petitioner asks that this motion be granted and the matter be set down for argument in accordance with Rule 50 (b).

/s/ WARREN W. GRIMES
Attorney for petitioner.

APPELLANT'S MOTION FOR ENTRY OF DECISION

Comes now the petitioner, Joseph N. Romm, by his attorney, Warren W. Grimes, and pursuant to the opinion and mandate issued in this case by the United States Court of Appeals for the Fourth Circuit, respectfully shows this Court that, under Rule 50 computation attached hereto, its decision should be entered for the following correct amounts:

Year	*Income Tax Deficiencies*	*Additions to the Tax*
1942	$ 2,159.56	$1,079.78
1943	707.95	353.98
1944	11,536.89	5,768.45
1945	1,500.43	750.22
1946	(13,088.81) Overpayment August 11, 1954	4,016.06

and that the amounts found by this Court in its decision entered July 26, 1956, having been assessed under Section 7485, I.R.C. for 1954, not having been paid, the assessment to be revised to conform hereto.

WARREN W. GRIMES
Attorney for Petitioner

ORDER VACATING TAX COURT DECISION AND SETTING HEARING

Upon consideration of motion of counsel for petitioners filed this date, the decision of this Court entered November 4, 1957, is hereby vacated and set aside, and it is further

ORDERED, That the petitioners' motion for entry of decision, with computation attached, be filed as of this date and that hearing on motions for entry of decision filed by both parties is set for Washington, D. C., at 10 A. M., December 11, 1957.

Entered November 20, 1957.

JOHN E. MULRONEY,
Judge.

ORDER AND DECISION APPEALED

Pursuant to Order of this Court dated November 20, 1957, hearing was had upon the motions of both parties for the entry of decision and at the conclusion of the hearing the matter was considered and the Court took the same under advisement.

It appears to the Court that what petitioner Joseph N. Romm is now seeking is a new Rule 50 computation based on an argument which raises new issues. The record shows the parties filed an agreed computation of the tax on July 24, 1956, after the Opinion of this Court, and the matter is now here on the Mandate of the United States Court of Appeals for the Fourth Circuit which commands, in part:

> It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is

hereby, modified as set forth in the opinion of the Court filed herein and, as so modified, it is affirmed;

• • •

The opinion of the Court of Appeals (Joseph N. Romm and Helen K. Romm, his wife, v. Commissioner of Internal Revenue, No. 7366, Decided May 27, 1957) shows quite clearly that the modification ordered was as to the allocation of a payment of $831.24 with respect to the 1946 deficiency and as to the liability of taxpayer's wife. This modification is reflected in respondent's computation accompanying his motion for decision, which computation we hold to be correct, and the following will be the

DECISION

Pursuant to the Mandate of the United States Court of Appeals for the Fourth Circuit, filed July 1, 1957, whereby the decision of this Court in this cause was modified and the motions for entry of decision filed by the respondent herein on October 31, 1957, it is

ORDERED: That the above entitled case, in so far as it purports to relate to Helen K. Romm, be dismissed as to her, and it is

ORDERED and DECIDED: That there are no deficiencies in income tax and additions to tax, or overpayments, therefor, due from or to her for the taxable years 1942 to 1946, inclusive; and it is further

ORDERED and DECIDED: That there are now unpaid deficiencies in income tax and addition to the tax due from petitioner Joseph N. Romm, as follows:

Year	*Income Tax*	*Additions to Tax*
1942	$ 2,159.56	$ 1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,887.27

JOHN E. MULRONEY,
Judge.

Entered Dec. 17, 1957.

PETITION FOR REVIEW

To The Honorable, The Judges of the United States Court of Appeals for the Fourth Judicial Circuit:

JOSEPH N. ROMM hereby petitions the United States Court of Appeals for the Fourth Judicial Circuit to review the decision of The Tax Court of the United States entered on the 17th day of December, 1957, ordering and deciding that there are deficiencies in income taxes and additions thereto the same as follows:

1942	$2,159.56 deficiency	$1,079.78 addition
1943	2,145.22 deficiency	1,072.61 addition
1944	15,745.65 deficiency	7,872.83 addition
1945	16,853.67 deficiency	8,426.84 addition
1946	3,613.85 deficiency	12,887.27 addition

This petition is filed pursuant to the provisions of section 7482, Internal Revenue Code of 1954 (26 USCA sec. 7482).

The income tax returns involved were filed with the Collector (now District Director) of Internal Revenue, Baltimore, Maryland.

Joseph N. Romm

WARREN W. GRIMES
Shoreham Building, Washington 5, D. C.,
Attorney for petitioner on review.

DECISION PRESENTLY SOUGHT TO BE REVIEWED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SOBELOFF, Chief Judge:

For the second time the parties to this case are before us on petition to review a decision of the Tax Court. The

sole question raised in the present proceeding is the scope of our mandate in the first.

Litigation between the taxpayer, Joseph N. Romm, and the Commissioner of Internal Revenue began after a deficiency assessment was made for the years 1942 through 1946. The Tax Court sustained the assessed deficiencies and fraud penalties. In our review a number of issues were presented, and as to all but two the Tax Court was affirmed. *Romm v. Commissioner of Internal Revenue*, 245 F.2d 730 (4 Cir., 1957). Among the contested procedures with which we found no fault was the manner in which the Tax Court had applied the net worth method of computing income. In our opinion we noted that the only challenge to the net worth computation was that certain assets in the name of the taxpayer's wife had improperly been included in the husband's net worth. We held that their inclusion was not improper.

In only two minor respects did we order the Tax Court to modify its decision. Since the taxpayer and his wife had not filed joint returns, we held that she was not liable for the deficiencies. We also found that interest had been erroneously computed.

In accordance with our mandate, the Tax Court, on November 4, 1957, entered a decision dismissing the case against Romm's wife, and recomputing the interest. Romm then moved to stay the Tax Court's judgment and requested leave to file counter-recomputation under Rule 50 of the Tax Court's Rules of Practice. Accordingly, Judge Mulroney of the Tax Court granted the taxpayer's request and set a hearing on the recomputations.

In his counter-recomputation, Romm arrived at an entirely new, and much lessened, tax liability. For the first time, he sought to reduce the annual increase in his net worth by the amount of deficiencies and penalties which had been subsequently asserted in respect to the several years involved.

The Tax Court rejected the counter-recomputation as raising new issues. It held that neither the mandate of this court nor Rule 50 would permit the belated injection of such new matter.

Romm's answer here is that he was not trying to raise "any new issues" within the meaning of the Tax Court's Rule 50, but that even if he was, the mandate of this court "compelled an entirely new decision," and that, therefore, the issue raised, even if new, should have been considered.

Our mandate was to the contrary of Romm's assertion, and the Tax Cour did not err. This is not a case in which on reversal a new hearing was directed. We ordered only that the decision of the Tax Court be "modified as set forth in the opinion of the court filed herein . . . ," and on all other matters the decision below was expressly affirmed. Judge Mulroney properly confined himself to the correction of the errors noted in the opinion, which was incorporated into our mandate. See: *Peary-Byrnes Lumber Co. v. Commissioner*, 86 F.2d 234 (5 cir., 1934); *Helvering v. Kendrick Coal & Dock Co.*, 72 F.2d 330 (8 cir., 1934).

We think *Polizzi v. Commissioner of Internal Revenue*, 247 F.2d 875 (6 cir., 1957), relied on by Romm, inapposite. Until computations under Rule 50 were filed in that case, the taxpayer was given no notice of the Commissioner's disapproval, as an insufficient joint return, of a return signed by the husband only, although it was clearly indicated on the face of the paper that it was intended to be a joint return. Because it was there considered that the Commissioner had misled the taxpayer by not putting him on notice earlier that the joint basis of computation was to be contested, the Sixth Circuit remanded the case for a new hearing and amendement of the pleadings.

Even if we should treat the present appeal as a motion to amend our mandate, Romm cannot prevail, for his basic claim is lacking in merit.

In the cases relied on by Romm, the courts held that, in determining the amount of corporate earnings and profits available for distribution as dividends, deficiencies and fraud penalties owing from the corporation to the government are to be subtracted from the earnings and profits. Cf. *Drybrough* v. *Commissioner of Internal Revenue*, 238 F.2d 735 (6 cir., 1956); *Stern Brothers & Co.*, 16 T.C. 295 (1951); *Estate of Esther M. Stein*, 25 T.C. 940 (1956). It was legal and proper to allow such an adjustment. Here credit is sought for Romm's own federal taxes and penalties, as a deduction from his annual increase in net worth. Whether income is ascertained by the net worth method of computation or otherwise, it is fundamental in our tax laws that a taxpayer may not deduct from his annual taxable income the amount of his federal tax or penalties; the Internal Revenue Code will not permit it. (1939 I.R.C., Sec. 23 (c) (1) (a), 26 U.S.C.A., Sec. 7482. Cf. *Holland* v. *United States*, 348 U.S. 121, 125 (1954).

Affirmed.

SUPREME COURT, U. S.

06-2[illegible] 195[illegible]

No. 239

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOSEPH N. ROMM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

A. F. PRESCOTT,
ARTHUR I. GOULD,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and rule involved	2
Statement	4
Argument	6
Conclusion	8

CITATIONS

Cases:	
Bankers Coal Co. v. *Burnet*, 287 U. S. 308	7
Commissioner v. *Superior Yarn Mills*, 228 F. 2d 736	7
Drybrough v. *Commissioner*, 238 F. 2d 735	7
Holland v. *United States*, 348 U. S. 121	6
Peacy-Byrnes Lumber Co. v. *Commissioner*, 86 F. 2d 234	7
Polizzi v. *Commissioner*, 247 F. 2d 875	7
Stein, Estate of Esther M. v. *Commissioner*, 25 T. C. 940	7
Stern Bros. & Co. v. *Commissioner*, 16 T. C. 295	7
Statutes:	
Internal Revenue Code of 1939, § 23(c), 26 U.S.C. (1952 ed.) 23(c)	3, 6
Internal Revenue Code of 1954, § 7482, 26 U.S.C. (Supp. V) 7482	2
Miscellaneous:	
Rev. Rul. 57-332, 1957-2 Cum. Bull. 231	7
Rules of Practice of the Tax Court of the United States, Rule 50	3, 4, 7

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 239

JOSEPH N. ROMM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The first opinion of the Tax Court is not officially reported. The first opinion of the court of appeals modifying and otherwise affirming the Tax Court is reported at 245 F. 2d 730. This Court denied certiorari, 355 U.S. 862. The order and decision of the Tax Court entered to carry out the mandate of the court of appeals are not officially reported (Pet. App. 5-6.). The opinion of the court of appeals affirming the order and decision of the Tax Court is not yet reported (Pet. App. 7-10).

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1958. The petition for a writ of certiorari was filed on July 31, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether on remand of a case to the Tax Court for modification of its decision the taxpayer may raise new issues unrelated to the modification.

2. Whether in computing taxable income by the net worth method the increase in net worth should be reduced by Federal income taxes and penalties becoming due in that year.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C., Supp. V):

> SEC. 7482. COURTS OF REVIEW.
>
> (a) *Jurisdiction.*—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * * * *

(c) *Powers.*—(1) *To affirm, modify, or reverse.*—Upon such review, such courts shall have power to affirm or, if the decisions of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

* * * *

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(c) *Taxes generally.*—

(1) *Allowances in general.*—Taxes paid or accrued within the taxable year, except—

(A) Federal income taxes;

* * * *

Rules of Practice of the Tax Court of the United States (Rev. January 1957):

Rule 50. *Computations by parties for entry of decision.* — (a) *Agreed computations.* — Where the Court has filed its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to the report of the Court, they or either

of them shall file promptly with the Court an original and 2 copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision.

* * * *

(c) *Limits on argument under this Rule.*—Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for retrial or reconsideration.

STATEMENT

After the Tax Court announced its first opinion in this case (1956 P-H T. C. Mem. Dec. ¶ 56,104), the parties agreed upon a computation of the taxpayer's liability in conformity with the opinion. See Tax Court Rule 50, *supra*, pp. 3-4. The Tax Court entered its decision on the basis of the agreed computation. On petition for review, the court of appeals modified the decision in two minor respects, stating in its opinion (245 F.2d 730, 736):

> The case is remanded to the Tax Court for modification of the order as to interest on the deficiency and as to the liability of the taxpayer's wife. In all other respects, the decision is affirmed.

The judgment and mandate in turn provided (Pet. App. 1):

> It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is hereby, modified as set forth in the opinion of the Court filed herein and, as so modified, it is affirmed; and that this cause be, and the same is hereby, remanded to The Tax Court of the United States for further proceedings not inconsistent with the opinion of the Court filed herein. May 27, 1957.

The taxpayer's petition for certiorari was denied. 355 U. S. 862.

On remand, the Tax Court entered a new decision eliminating the wife's liability and recomputing the interest (Pet. App. 2-3). Petitioner did not question those items but filed an entirely new computation of his basic tax liability, asserting for the first time that his net income for each of the years in question should be reduced by the taxes and penalties held to have been due on the preceding year's income.[*] The Tax Court rejected the recomputation on the ground that it raised new issues and was not in accordance with the mandate of the court of appeals (Pet. App. 5-6). The court of appeals affirmed, noting in addition that the issue sought to be raised was "lacking in merit" (Pet. App. 7-10).

---

[*] See the appendix to petitioner's brief in the court of appeals, pp. Ap. 5-Ap. 11.

ARGUMENT

1. Since the court of appeals in fact disposed of petitioner's claim on the merits, he can hardly object to the primary holding that the claim was not timely raised. Indeed, petitioner's underlying claim is so patently frivolous that the question whether he can raise it seems quite academic.

In substance, petitioner seeks a deduction from his net income for Federal income taxes. Clearly no such deduction is allowable. Int. Rev. Code, 1939, § 23(c)(1)(A), *supra*, p. 3. Petitioner, accordingly, takes an indirect approach. He suggests that since the taxes and penalties for, say, 1945 were payable March 15, 1946, they were an outstanding liability on December 31, 1946, and therefore reduced his net worth as of that date. Since his income was reconstructed by the net worth method, the necessary result, he says, is to reduce his net income for the year. What petitioner overlooks is that any reduction of net worth (*e.g.*, because of amounts spent during the year on personal expenses) which is not attributable to a deductible expense must be added back to the increase in net worth to determine the true income for the year. *Holland* v. *United States*, 348 U.S. 121, 125. Thus the result is the same whether the taxes due are treated as not reducing net worth or are deducted from net worth with a compensating adjustment to income.

The cases cited by petitioner hold only that a corporation's "earnings and profits"—which determine whether distributions are taxable as dividends—are

reduced by taxes, penalties, and interest assessed. *Dysbrough* v. *Commissioner*, 238 F.2d 735 (C. A. 6); *Estate of Esther M. Stein* v. *Commissioner*, 25 T. C. 940; *Stern Bros. & Co.* v. *Commissioner*, 16 T. C. 295; Rev. Rul. 57-332, 1957-2 Cum. Bull. 231. They are obviously irrelevant here.

2. Petitioner's argument on the timeliness of his claim is no more substantial. The court of appeals did not remand the case for a rehearing. It expressly affirmed the decision except for two minor issues, as to which it remanded the case to permit the decision to be modified. The Tax Court was required to confine itself to those issues. *E.g.*, *Peace-Byrnes Lumber Co.* v. *Commissioner*, 86 F.2d 231 (C. A. 5). Indeed, the issue could not properly have been raised under the Rule 50 computation after the Tax Court's first opinion on the merits. Tax Court Rule 50(c); *Bankers Coal Co.* v. *Ewart*, 287 U. S. 308; *Commissioner* v. *Superior Yarn Mills*, 228 F.2d 736 (C. A. 4).

Polizzi v. *Commissioner*, 247 F.2d 875 (C. A. 6), is of no help to petitioner. There the court of appeals held, on an appeal from an initial decision of the Tax Court, that the Tax Court had abused its discretion in refusing to allow the taxpayer a further hearing on an issue of which he had not been fairly apprised until the Rule 50 computation. In this case, not only was there no justification for the failure to raise the issue in the original Tax Court pleadings, but the issue was not raised at all until after the decision had been affirmed by the court of appeals in all material respects and remanded for two minor modifications.

CONCLUSION

The petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

A. F. PRESCOTT,
ARTHUR I. GOULD,
Attorneys.

AUGUST 1958.